86-379

No. .....

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1986

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DONNA K. DOWD, et al. and
CATHERINE ELLIS, et al.,

Petitioners,

v.

TEXTRON, INC. and
BELL HELICOPTER TEXTRON, INC.,

Respondents.

—o—

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

—o—

FLETCHER N. BALDWIN, JR.
Holland Law Center
University of Florida
Gainesville, FL 32611
(904) 392-2211

JOHN H. GREEN
418 North Texas Avenue
Odessa, Texas 79761
(915) 332-0588
Attorneys for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 228-8845 (tone) 75
or call collect (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT IN *DOWD V. TEXTRON INFRA,* ALTERING THE GOVERNMENT CONTRACTOR DEFENSE, IS A DEPARTURE FROM AND IN CONFLICT WITH SUBSTANTIAL EXISTING CASE LAW OF OTHER FEDERAL AND STATE JURISDICTIONS INCLUDING CLEAR CONFLICT WITH OTHER UNITED STATES CIRCUIT COURTS.

II. WHETHER THE DECISION OF THE UNITED STATES COURT OF APPEALS IN *DOWD V. TEXTRON INFRA* ABOLISHED PETITIONER'S CONSTITUTIONAL GUARANTEE TO A RIGHT TO TRIAL BY JURY FOUND IN THE SEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

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No. .....

—o—

In The

Supreme Court of the United States

October Term, 1986

—o—

Donna K. Dowd, Widow of Douglas Loel Dowd, Deceased; Charles D. Dowd, minor, surviving son of Douglas Loel Dowd, Deceased, by his mother and next friend, Donna K. Dowd; Dawn Dowd, minor, surviving daughter of Douglas Loel Dowd, Deceased, by her mother and next friend, Donna K. Dowd; Donna K. Dowd, Personal Representative of the Estate of Douglas Loel Dowd, Deceased; Catherine Ellis, Widow of Robert Schild Ellis, Deceased; Michael Ellis, infant, surviving son of Robert Schild Ellis, Deceased, by his mother and next friend, Catherine Ellis; Steven Ellis, minor, by his mother and next friend, Catherine Ellis; Catherine Ellis, Personal Representative of the Estate of Robert Schild Ellis, Deceased, Appellees,

Petitioners,

v.

TEXTRON, INC., a Delaware Corporation; Bell Helicopter Textron, Inc., a Division of Textron, Inc., a Delaware Corporation, Appellants,

Respondents.

—o—

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

—o—

TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

The Petitioners Donna K. Dowd, et.al. respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, made and entered May 27, 1986.

———o———

STATEMENT OF THE GROUND ON WHICH JURISDICTION IS INVOKED

(i) The judgment sought to be reviewed is the opinion of the United States Court of Appeals for the Fourth Circuit in *Dowd et.al. v. Textron, Inc., et.al.*, 792 F.2d 409 (4th Cir. 1986).

(ii) A petition for rehearing was timely filed and denied on June 25, 1986.

(iii) This decision was announced in conjunction with two other cases involving the same legal and constitutional issues regarding the Government Contractor Defense and the right to trial by jury.

Tozer v. LTV Corp., 792 F.2d 403 (4th Cir. 1986) *and Boyle, et.al. v. United Technologies Corp.*, 792 F.2d 413 (4th Cir. 1986).

(iv) The statutory provision conferring jurisdiction to review the judgment in question is 28 U.S.C.A. § 1254(1).

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CONSTITUTIOIAL PROVISION INVOLVED

The Constitution of the United States, Seventh Amendment, Right to Trial By Jury:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, then according to the rules of the common law."

———o———

STATEMENT OF THE CASE[1]

On May 26, 1981 an AH-1S helicopter crashed. The crash occurred during a familiarization flight and was due to mast bumping. Mast bumping occurs when the hub of the rotor system on a helicopter strikes the mast and severs it. "When most bumping occurs in flight, it is generally catastrophic because the rotor separates from the mast, and the helicopter can no longer fly." *Dowd v. Textron, Inc.*, 792 F.2d 409, 410 (4th Cir. 1986). Such was the tragic result in this case, the rotor separated while in flight and the blades cut through the canopy (App. 424, 429, 445, 492. Major Dowd and Lt. Ellis were killed as a result of the crash that followed.

The AH-1S in question had been delivered to the Navy at the Navy Test Pilot School on May 14, 1981. At the time of the crash it had only 23 hours flight time since it was modified, at Bell's plant, from an AH-1G to an AH-1S (Def. Ex. 6, p.4).

The AH-1S that crashed was designed, patented, manufactured, then sold by Bell to the Army as an AH-1G,

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[1] App. is citation to the Appendix filed in the Court below in *Dowd v. Textron, Inc.*, 792 F.2d 409 (4th Cir. 1986).

under a 1971 contract. Throughout the years certain modifications had been made including its conversion in 1978 to an AH-1S. As the Court below noted: "The modification added mission equipment to the helicopter; the rotor system was not changed." *Dowd v. Textron, Inc.* supra at 411 (See also App. 533, 536). The rotor system in question was designed and manufactured by Bell in secret, without any input from the Army (App. 535) (PL. Ex. 161). There is no evidence to suggest that the Army participated in any manner in the design of the 540 Rotor System and the evidence at trial was that a number of years before selling the helicopter with the 540 Rotor System to the Army, Bell had obtained a patent on the 540 Rotor System. At the time of the crash in this case, Bell's patent on the rotor system had not lapsed and was in effect (Pl. Ex. 167-Bell Patent on 540 Rotor System, dated 10-25-66) (App. 533-536). The system was presented to the Army-*unsolicited* (App. 535). The fact is that during the design, patent and sale to the Army, the system in question remained in its original state. At the time of the crash, the AH-1 rotor system was in its original design. There never was a test performed by the Army for mast bumping (App. 1992, 1997). The Court below assumed that military contractors "ordinarily work closely with the military" and that it must have an almost similar immunity, without hard proof. *Tozer v. LTV Corp.,* 792 F.2d 403, 406 (4th Cir. 1986). The Court below seemed to impute Bell's knowledge of the defective design to the Army, thus removing a critical element of the military contractor's burden. At the date of the *Dowd* trial there had been a record of over 60 crashes, with a loss of more than 250 lives, at a cost

of fifty million dollars per crash (App. 478-480, 510). See also *Bell v. Anderson,* 478 S.W.2d 191 (Tex. App. 1972).

The Army became concerned over the in-flight break-ups and in 1972 conducted a study. The study was information gathering only (Pl. Ex. 122). In 1974 a second Army study was launched. The study was completed within two months (App. 1079) and concluded that Bell should conduct studies to determine the fault (App. 1090).

Bell conducted an in-house study completed in July, 1974. As a result Bell again persuaded the Army to enter into an unsolicited contract that in part permitted Bell to continue its investigation of its own patented rotor system at Army expense (Def. Ex. 62). Bell did not furnish the Army with any information previously prepared with respect to mast bumping (App. 541-593; 1863-1879). In subsequent modification contracts Bell did not notify the Army of any dangers (App. 1565-1569). Furthermore, under the 1978 modification contract "Total System Responsibility" as well as "Systems Safety" were Bell's responsibility (Def. Ex. 1, pp. 3-4). The Court below noted that:

> In the late 1970's, Bell proposed three rotor systems modifications that it hoped would reduce mast bumping: the hub spring, the mast plug, and the four-bladed rotor. *Dowd v. Textron, Inc. supra* at 411.

The evidence was that Bell never developed a hub spring for the AH-1S. It was a jury question whether Bell gave the Army an option of installing a hub spring. The Court below found it to be a question of law not fact.

The mast plug issue as presented to the jury centered around the fact of whether the plug would offer additional

torque carrying capacity and whether if the mast was hit by the hub would it separate and cause failure. Again, a question the Court found to be outside the capability of the jury. The fact is that the AH-1S has a thick wall mast. It would serve no useful purpose for the Army to insert a plug in the thick wall mast, it was designed for the UH-1's thin wall mast (App. 1887).

As to the four-bladed rotor system, there is no evidence that an Engineering Change Proposal (E.C.P.) was submitted to the Army with respect to the four-blade system. *Dowd v. Textron, Inc., supra* at 411.

At best the Court below finds *suggestions* in the record, not hard facts. *Id.*

In fact, Bell's expert testified there was no mention by Bell of safety as the reason the four-bladed rotor was developed by Bell. As far as the Army was concerned, based upon the studies and information supplied to them by Bell, the Bell two-bladed system was safe (App. 1347). A Bell engineer testified that the only advantage of the four-bladed system was "it gave a little better performance and a little better agility than two-bladed aircraft." (App. 1477, 1478). The cost to install a four-bladed rotor would be over half a million dollars per aircraft for a "slightly better performance" (App. 1481). It was not designed to help eliminate mast bumping that occurred on the Bell-designed 540 rotor system which was on the AH-1S (App. 1483).

The helicopter involved in this appeal was manufactured as an AH-1G under a 1971 contract. This contract was never introduced by Bell at trial. The Court suggests that the contract calls out the helicopter's de-

tail specifications, so even though Bell did not meet its burden of proof that the AH-1G and Bell's rotor system met any specifications when it was originally manufactured, the Court under its new theory reversed.

It is important to note that the Bell rotor system placed on the AH-1S modified helicopter was of the same design as on the original AH-1G. The rotor was overhauled by the Army and at trial it was Bell's position that the Army did nothing wrong to cause the crash (App. 194). The overhaul done by the Army was to install elastomeric bearings. According to Bell witnesses, the elastomeric bearing was put on "in place of teflon because the teflon had a very low wear life." (App. 1449). Bell's witness was further asked:

> Q. Was that (elastomeric bearing) put on there having anything to do with main rotor separation or the mast bumping issue?
>
> A. *No sir* (App. 1449).

The record indicates that Bell did not notify the Army of any dangers of the system, as Bell was required to under the 1978 modification contract. This safety standard was called out in paragraph 3.2.14 of the modification specification (Def. Ex. 3, p. 55). Under the safety plan, MIL-S-882, "No single detectable hazard cause factor shall potentially result in a mishap." (App. 1565-1569). Also, under the modification contract, "Total Systems Responsibility" and "Systems Safety" are Bell's responsibility (Def. Ex. 1, pp. 3-4, par. 2.4, 2.4.1, 2.4.2 and 2.4.3, p. 56). Unquestionably, the jury found these safety standards were not met.

The evidence presented by petitioner at the trial attempted to demonstrate that the crash was due to the defective design, which caused mast bumping, and that both pilots were highly qualified and were not negligent.

The jury found that the crash in question was due to defective design, which caused mast bumping, and that the pilots were not negligent (App. 429-433, 445-492; 493-511). The Court of Appeals removed the jury from its historical fact finding role and replaced its verdict. The remarkable conclusion that it is dangerous to interfere with discipline in military contractor cases, *Tozer v. LTV Corp. supra* at 406,[2] was an important element in the Court's ultimate judgment that immunity should be expanded to contractors doing business with the government to a greater degree than approved in other jurisdictions.

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REASONS FOR GRANTING THE WRIT

This case represents questions concerning the concept of sovereign immunity within the context of the government contractor defense. The fact is that the lower courts are confused as to the proper application of the test permitting governmental immunity for governmental contractors, but not so confused as to ignore it entirely. Not so the fourth circuit, in its haste to allocate a constitutional governmental immunity to a private corporation,

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[2] It is respectfully submitted that most military personnel would disagree. Military discipline does not preclude fair compensation to military personnel who risk their lives where a third party is responsible for the defect in equipment.

it has come into such conflict with the already confusing applications of the contractor defense in other circuits and district courts that it now leaves a critical area of federal law in a state of nonuniformity and confusion.

I

1. In the present case the trial court in a lengthy opinion (Appendix A) correctly developed the existing law where it concluded that the government contractor defense requires a four part burden to be assumed by the contractor. (App. A, pp. 6-7). The Court citing *McKay v. Rockwell International Corp.*, 704 F.2d 444 (9th Cir. 1983), *cert. denied* 464 U.S. 1043 (1984) concluded that the contractor failed to carry its burden. See also *Shaw v. Gruman Aerospace Corp.*, 778 F.2d 736 (11th Cir. 1985) [Petition for Certiorari pending.] On appeal in the present case the Fourth Circuit Court of Appeals in all respects eliminated the government contract's four-part test in substance though keeping it intact in form only. *Dowd v. Textron, Inc.*, 792 F.2d 409 (4th Cir. 1986). As a result, the United States Court of Appeals for the Fourth Circuit is not only in conflict with other jurisdictions but also has eliminated the four-part military contractor defense in a circuit having jurisdiction over many complex military installations and substituted a one-part burden of proof. The burden of proof in the Fourth Circuit requires that a government contractor demonstrate that it did not willfully suppress certain facts. The slightest bit of proof showing governmental approval shields the contractor from damages under a theory of negligence or strict liability. In so doing, the Fourth Circuit unila-

terally granted sovereign immunity to government contractors because in reality the Court applied the *Feres-Stencel* doctrine to government contractors. See *Feres v. United States,* 340 U.S. 135 (1950) *and Stencel Aero Engineering Corp. v. United States,* 431 U.S. 666 (1976) [*Feres-Stencel* immunizes the United States from both direct tort liability and the obligation to indemnify]. In this sense, the Fourth Circuit ignored the well reasoned theories behind the government contractor defense as articulated in other circuits. See, *e.g., McKay v. Rockwell International Corp., supra; Shaw v. Grumman Aerospace Corp.,* 778 F.2d 736 (11th Cir. 1985); *Tillett v. Case Co.,* 756 F.2d 591 (7th Cir. 1985); *Bynum v. FMC Corp.,* 770 F.2d 556 (5th Cir. 1985), *and Koutsoubos v. Boeing Vertol Co.,* 755 F.2d 352 (3rd Cir. 1985) [developing a hybrid test for contractor immunity, a test that nevertheless attached a burden upon the government contractor]. See also *Trevino v. General Dynamics Corp.,* 626 F. Supp. 1330 (E.D. Tex. 1986) *and Mackey v. Maremount Corp.,* 504 A. 2d 908 (PA 1986) and *Johnston v. United States,* 568 F.Supp. 351, 356 (1983), wherein the Court noted:

> "[9] In a handful of relatively recent cases, however, all involving products produced for the military, the government contract defense has been extended to products liability actions for personal injury. See Note, *supra,* 23 B.C.L.Rev. at 1055-64; *McKay, supra; Agent Orange, supra; Sanner v. Ford Motor Co.,* 144 N.J.Super.1, 364 A.2d 43 (1976), *aff'd* 154 N.J.Super. 407, 381 A.2d 805 (1977), *cert. denied* 75 N.J. 616, 384 A.2d 846 (1978); *Casabianca v. Casabianca,* 104 Mis.2d 348, 428 N.Y.S.2d 400 (Sup.Ct. 1980)."

2. Government defense contractors historically have been held liable for the injuries or death to servicepersons

caused by negligence or defects in products which they have designed, manufactured or supplied to the military. See *Quadrini v. Sikorsky Aircraft Division, United Aircraft Corporation,* 425 F.Supp. 81 (D.Conn. 1977) [negligence and breach of warranty action for death of two marine majors in a helicopter crash]; *Jennings v. Goodyear Air Corp.,* 227 F.Supp. 246 (D.Del. 1964) [negligence and breach of warranty action for death of crewman in Navy dirigible crash]; *Montgomery v. Goodyear Tire & Rubber Co.,* 231 F.Supp. 447 (S.D.N.Y. 1964) [negligence action for death of crewman in a blimp crash]; *North American Aviation, Inc. v. Hughes,* 247 F.2d 517, 520 (1 Cir. 1957) [liability for death of the pilot due to negligent manufacture and inspection of an F-86F aircraft]; *Foster v. Day & Zimmerman,* 502 F.2d 867, 873-874 (5 Cir. 1974) [strict liability for injuries from premature explosion of a hand grenade]; *Whitaker v. Harvell-Kilgore Corp.,* 418 F.2d 1010 (5 Cir. 1969) [strict liability for premature explosion of a hand grenade used by a serviceman]).

More specifically, military defense contractors who design and supply aircraft to the military have been held liable in negligence and strict liability for the design of the aircraft and component parts sold to the military which injure or kill servicepersons. See *Boeing Airplane Co. v. Brown,* 291 F.2d 310 (9 Cir. 1961) [negligent design of a component part of a B-52, death of the crew]; *Moywer v. Martin Marietta Corp.,* 481 F.2d 585 (5 Cir. 1973) [negligent design of the ejection seat in a B-57A, death of the pilot]; *Kropp v. Douglas Aircraft Co.,* 329 F.Supp. 447 (E.D.N.Y. 1971) [negligent design of the ejection door in a A3A jet bomber, death of the crewmen];

Lindsay v. McDonnell Douglas Corporation, 460 F.2d 631 (8 Cir. 1972) [strict liability in the design and manufacture of a F-4B, death of the crewmen]; *Renner v. Rockwell International Corporation,* 403 F.Supp. 849 (C.D.Cal. 1975 (vacated on other grounds) 587 F.2d 1030 [negligence and strict liability for design and manufacture of a RA-5C aircraft tail hook, death of the crewmen]; *O'Keefe v. Boeing,* 335 F.Supp. 1104 (S.D.N.Y. 1971) [negligent design of a B-52 bomber, death of the crew]; *Stencel Aero Engineering Corp. v. United States,* (1977) 431 U.S. 666, 52 L.Ed.2d 665 [underlying action based upon negligence in design and manufacture of a F-100 ejection system]; *Gladstone v. Grumann Aircraft Engineering Corp.,* (1938) 254 App. Div. 871, 5 N.Y.S.2d 252 [negligent specifications by the manufacturer, death]).

The requirement of compulsion to insulate the manufacturer of a government product from liability is illustrated by the leading case of *Sanner v. Ford Motor Co.,* 144 N.J. Super. 1, 364 A.2d 43 (1976), *aff'd,* 154 N.J. Super. 407, 381 A.2d 805 (1977). In that case, the Ford Motor Company told the government that a Jeep should have seatbelts. The government rejected the suggestion and insisted that the Jeep be manufactured without seatbelts. Obviously, it would have been unfair to hold Ford Motor Company liable for a product defect where the decision to retain the defect was the Federal government's and not Ford's. That is a far cry from a situation where a manufacturer designs a helicopter rotor system, patents the system, then presents it to the Federal government for acceptance. Whether or not the Federal government examines the design in detail, the design remains that of the manufacturer and is the manufacturer's responsibility

unless the government is made aware of a defect and decides to retain it.

The requirement of compulsion has been so well-established that the Ninth Circuit has previously described the requirement as "elementary." Thus, in *Merritt, Chapman & Scott Corp. v. Guy F. Atkinson Co.*, 295 F.2d 14 (9th Cir. 1961), the court, holding that the government-contractor defense was not available to a contractor who designed and constructed a defective temporary dam pursuant to government plans and specifications, stated: "[i]t is elementary that compulsion must exist before the 'government contract defense' is available."

In *Boeing Airplane Co. v. Brown,* 291 F.2d 310 (9th Cir. 1961) (relied upon in *O'Keefe v. Boeing Company,* 335 F.Supp. 1104 (S.D.N.Y. 1971)) a plane manufacturer attempted to avoid liability for a crash caused by a defectively designed alternator by arguing that "if the design was defective . . . the Air Force, in view of its continual contact with the project [approving the design of the alternator drive prior to manufacture, supervising its manufacture, monitoring the qualifications and production testing, and accepting the completed aircraft] was negligent in its failure to discover the defect and require its correction." *Boeing Airplane Co. v. Brown, supra* at 316-317. This was essentially the government contractor defense, although not specifically so labeled. In rejecting the defense, the Court recognized that the manufacture was responsible for its own defective design despite government approval with no compulsion. From this concept would emerge a four part defense for contractors.

3. The four part test applicable to government contractors was analyzed in detail in *McKay v. Rockwell International Corp., supra.*

In *McKay* the Ninth Circuit Court of Appeals concluded that a supplier of military equipment is not liable for design defects when: (1) the United States is immune from liability under the doctrine established in *Feres v. United States,* 340 U.S. 135 (1950) and *Stencel Aero Engineering Corp. v. United States,* 431 U.S. 666 (1976); (2) the supplier proves that the United States established or approved reasonably precise specifications for the allegedly defective military equipment; (3) the equipment conformed to those specifications *and* (4) the supplier warned the United States about patent errors or dangers that arose from the government's design that were known to the supplier but not to the United States. *McKay v. Rockwell International Corp., supra* at 451.

Regardless of the result in *McKay* the fact is that the Court recognized a defense, not a cosmetic defense but a real defense. However, in the present case, the Court of Appeals for the Fourth Circuit redefined out of existence the military contractor defense, something no other circuit has even hinted at. It is clear from the opinion in *Dowd* that the military contractor in the fourth circuit no longer has a burden of establishing and proving each of the four requirements of defense as set forth in *McKay.* See also *Shaw v. Grumman Aerospace Corp., supra.* The confusion demonstrates a clear need for uniformity since the issue in question is of national concern.

4. How did the Court in *Dowd* reach such a preplexing conclusion that, in effect, government contractors have sov-

ereign immunity? In *Dowd* two servicemen were killed when the helicopter they were flying crashed during a flight instruction session. The widows of the servicemen brought suit against Textron Incorporated and its subsidiary Bell Helicopter (Bell), the designer and manufacturer of the helicopter who had patented the 540 rotor system before selling it to the Army. The jury returned a general verdict in favor of Plaintiff. As noted in the statement of facts, *supra,* the jury has ample evidence to find that a defectively designed helicopter rotor system patented by the manufacturer was the proximate cause of the two deaths. In reversing the lower court, the Fourth Circuit did not dispute the finding that Bell had designed a defective rotor system. Instead, the Court determined that the defendant satisfied all of the elements of a military contractor defense and, thus, was not liable.

In *McKay* as well as the other circuits having occasion to consider the issue, one point remains constant: the military contractor defense is exactly what it purports to be—a defense. Thus, while it is clear that the Petitioner has the burden of establishing the elements of a prima facie case, it is equally clear that the respondent has the burden of establishing the elements of an affirmative defense. In fact, the respondent "has the burden of proving by a preponderance of the evidence" each element of the military contractor defense. *McKay v. Rockwell International Corporation,* supra at 453. In the present case, the burden was on Bell not only to establish, but prove, each of the four requirements by a preponderance of the evidence. This burden was removed in the Court below.

In its rush to grant governmental immunity to a private contractor, the Court failed to recognize the rationale

behind the government contractors defense. The government contractor defense is designed to relieve suppliers from liability to injured military personnel when the government is found to be responsible for the defective design. *In re Agent Orange,* 506 F.Supp. 762, 792 (E.D.N.Y. 1980). The purpose of relieving these contractors from liability is to insure that the government's discretionary decision to order the design, production, and use of military equipment is not impaired. See generally Comment, *Agent Orange and the Government Contractor Defense,* 36 U. Miami L. Rev. 489, 509 (1982). A strong justification for immunizing contractors when the government is responsible for the design is that fear of liability will dissuade other contractors from participating in government procurement programs, thereby hampering the government's ability to effectuate discretionary decisions. *In re Agent Orange* supra at 794. The use of the defense thus represents the principle that the need for the government to carry out discretionary decisions with the support of its suppliers outweighs the policies embodied in conventional products liability law. *Id.* at 1054.

Under the *In re Agent Orange* rationale the purpose of the defense is to preserve the government's discretionary design choices, the threshold inquiry that courts must face when applying the defense is whether the military equipment was procured pursuant to a discretionary decision that deserves judicial protection, this the Court below failed to consider. The defense as articulated by most courts requires a showing of compulsion. See *e.g., Sanner v. Ford Motor Co.,* 144 N.J. Super, 1, 364 A.2d 43 (1976) *Aff'd* 154 N.J. Super. 407, 381 A.2d 805 (1977), cert. denied 75 N.S. 616, 384 A.2d 846 (1978). This differs somewhat

from the *McKay* court's model and the no model adopted by the Fourth Circuit. A showing of compulsion indicates that the design established by the government was so essential to the fulfillment of a governmental policy, program, or objective, that the contractor had no choice but to manufacture the equipment in accordance with the design.

Unlike other courts, the court below expressly rejected the compulsion requirement, deliberately narrowing the scope of the defense by requiring a less than burdensome one-step contractor defense. In so doing, the court established a defense that fails to comport with the underlying purpose and design of the government contractor defense. Whereas the government contractor defense as originally conceived is concerned with safeguarding the government's discretionary design decisions, the "requirement" established by the Court below clearly protects all government contractor's discretionary decisions, unless it is proven that the contractor willfully suppressed facts. Under such a defense, a contractor who exercises total discretion over the design of the product and patents the product such as in the instant case, may be protected so long as the government approved the design. The defense also defeats the purpose of relieving contractors of misplaced liability. It is respectfully submitted that a universal federal standard is called for and any contractor who has exercised discretion over the design of a product could then be held liable for design defects because, absent compulsion, the contractor is in a position to prevent the defects before submitting the design for government approval. The present chaotic nature of the various "tests" to be applied to government contractor defenses does far more harm to military-contractor relationships in that judicial intervention

continues on an ad hoc basis. This is precisely what happened in *Dowd*. The Court of Appeals reexamined the record, facts, even factors not in the record, as well as the jury verdict concluding that Bell "established the elements of the military contractor defense. The district court thus erred in submitting the matter to the jury". *Dowd v. Textron, Inc.*, 792 F.2d 409, 412 (4th Cir. 1986). The Court suggests that a defendant need only establish some evidence of the four elements to avoid any liability for injuries resulting from its defectively designed product. Furthermore, the Court suggests that such a showing by the defendant takes the case completely out of the reach of the jury. Such a result undermines the heart of the Constitution by denying Petitioners their Seventh Amendment right to trial by jury. *Sioux City & P. Ry Co. v. Stout*, 17 WALL. (84 U.S.) 657, 664 (1874). See also, 2 STORY, COMMENTARIES ON THE CONSTITUTION, § 1779 (1833).

If Bell had put forth evidence at trial that proved each element, and if Petitioners had put forth no evidence to the contrary, then a direction that the district court enter a judgment for the defendant would be proper. However, even a cursory review of the record indicates that such was not the case. Instead, Petitioners put forth a wealth of evidence that established beyond any doubt that Bell failed to meet the requirements outlined in *Tozer v. LTV Corp.*, 792 F.2d 403, 406-408 (4th Cir. 1986).

In determining whether or not evidence was sufficient to uphold the verdict, Courts have consistently followed the rationale that the Court of Appeals "must view the evidence in the light most favorable to the jury's verdict and afford the prevailing party the benefit of all reasonable

inferences which can be drawn from the evidence''. *Klein v. Sears Roebuck and Co.*, 773 F.2d 1421, 1424 (4th Cir. 1985) *citing, Krotkoff v. Goucher College,* 585 F.2d 675, 677 (4th Cir. 1978). In light of the abundance of evidence presented by Petitioners, it takes little inference to determine that the jury placed more credence in the Petitioner's evidence than the respondent's.

Similarly, the district court judge would have been acting contrary to the great weight of case law as well as contrary to the law of the Fourth Circuit if he had followed that court's instructions and entered judgment for the defendant. To grant a motion for judgment notwithstanding the verdict the trial judge must give the nonmoving party benefit of every legitimate inference. If there is evidence upon which the jury could reasonably return a verdict in his favor, the motion must be denied. *Mays v. Pioneer Lumber Corporation,* 502 F.2d 106, 107 (4th Cir. 1974). Petitioner presented sufficient evidence that not only established the defendant's liability, but which also precluded defendants from proving by a preponderance of the evidence the requirements of the military contractor defense. So found the jury, thus, the district court judge was correct to deny the motion and the Court of Appeals was in error to direct him otherwise.

5. Petitioners also respectfully request this Court to grant the Petition in order to correct certain overlooked points of fact. A comparison of the trial court record and the Circuit Court's opinion clearly indicates that Circuit Court based its decision on facts not contained in the record as well as on assumptions which are contradicted by both facts in the record and jury findings. A review of the four requirements of the military contractor defense pro-

vides ample support for Petitioners' contentions. Thus, "a supplier of military equipment is not liable in tort for design defects when: 1) the United States is immune from liability; 2) the United States established or approved reasonably precise specifications for the equipment; 3) the equipment conformed to those specifications; and 4) the supplier warned the United States about dangers involved in the use of the equipment that were known to the supplier but not to the United States." *Dowd v. Textron, supra* at 411. An examination of these requirements in detail produce the following conclusions:

6. (i) Petitioners recognize that the United States is immune from liability. However, Petitioners assert that the record does not support a possible finding that respondent met its burden with regard to the remaining three requirements by a preponderance of the evidence.

7. (ii) The second element requires that the United States establish or approve reasonably precise specifications for the equipment. Originally, this element was designed to protect suppliers who provided equipment in accordance with strict specifications provided by the military. *See McKay v. Rockwell International Corp., supra.* The second element has expanded to include situations where the military also approves the specifications. Under the "approval" test, the United States must approve the specifications of the particular piece of equipment at issue. Thus, in *Dowd,* defendant Bell is required to prove that the Army approved reasonably precise specifications for the 540 rotor system. The evidence is uncontradicted that Bell originally designed and developed the rotor system in secret without any participation by the Army, then patented the 540 rotor system and sold helicopters to the

Army which included the Bell-patented system *Dowd v. Textron, supra* at 411. App. 535, 587, 588, 598. (Trial Ex. 167 Bell patent on 540 rotor system).

Subsequent to the original purchases, there is evidence in the record to support the *Dowd* Court's finding that the Army investigated incidents of "mast bumping" in the early 1970's. Mast bumping caused the fatal accident in *Dowd*. However, the evidence indicates that mast bumping can result for a number of reasons, including pilot error (App. 1933, 1997, 2001). Thus, a defectively designed rotor system is not the sole cause of mast bumping.

Because of this factor, it is not surprising that the Army never reached a final conclusion on the mast bumping problem. Instead, there is uncontradicted evidence in the record which demonstrates that Bell repeatedly assured the Army that the Bell-patented rotor system was in fact safe, and that pilot error caused mast bumping (App. 1994-1995, 1997-2001).

8. In 1978, the Army contracted with Bell for a modification of the Bell helicopter the Army was then using. *Dowd v. Textron, supra* at 411-412. This Court correctly points out that the modification was undertaken to add mission equipment to the helicopter, but that the rotor system was not changed. *Id.* Furthermore, there is nothing in the record to suggest that the Army had any choice as to which rotor system would be installed in the modified helicopters. To the contrary, the record indicates that Bell's assurances gave the Army every reason to stay with the rotor system Bell designed and patented for the helicopter, even as modified (App. 1994-1995, 1997-2001). In light of the appellate court's ruling, this is a material fact which was overlooked.

Neither the continued use of the original helicopters nor the modification of the helicopters in ways totally unrelated to the rotor system can be considered *per se* approval of reasonably precise specifications of the rotor system as required by *Tozer*. *Tozer v. LTV, Corp., supra* at 405-407. Whether the Army gave such approval was a question of fact for the jury. As noted *supra,* Bell has the burden of proving by a preponderance of the evidence that the Army approved such specifications. *McKay v. Rockwell International, Corp. supra* at 453. The fact that the Army continued to use a patented rotor system which the Army purchased from the designer and patent-holder Bell, is not approval of specifications, as the Circuit Court so reasoned. Such reasoning by the Circuit Court was contrary to the evidence and jury finding as well as contrary to all established law regarding the government contractor defense. The jury verdict establishes that Bell failed to meet its burden. The Fourth Circuit Court of Appeals then substituted its judgment for the collective judgment of the jury, and denied Petitioners their constitutional right to a trier of fact.

9. While the lower court appears to have substituted its judgment for that of the jury on the second element, its theory of law also allowed it to omit from its opinion any facts which could conceivably be used to support satisfaction of the third element. This is not surprising, however, because no facts exist in the record. In *Tozer,* the Court noted that the equipment in question must conform to the specifications established or appproved under the second element. It is clear that the original rotor system design was not approved by the Army (App. 2025-2026). The Court's theory allowed it to accept Bell's contentions that

the original design is not at issue. (*Dowd v. Textron,* Appellant's Reply Brief, pp. 3-5). Rather the Court finds that the Army's request for a modification of the helicopters it had used for a number of years combined with a failure to require another rotor system (because Bell had assured the Army the existing one was safe) constitutes approval. Assuming *arguendo,* this satisfies the second element, it does not satisfy the third.

10. (iii) To meet the third element, Bell should have been required to show two things: reasonably precise specifications for the 540 rotor system and conformity to these specifications. The court's opinion below is void of any evidence which supports the contention that Bell's rotor system conformed to specifications approved by the Army. This is primarily because the Army never approved any specifications (App. 1361, 2016-2023) (Def. Ex. 3,4,5,123). It is here that the illogicies of the Court's Opinion surface. The Court concludes that the Army somehow *ex post facto* approved specifications for the rotor system by using the helicopters equipped with the system for some twenty years and conducting investigations on mast bumping. *Dowd v. Textron, supra* at 412. If this is so, then it is impossible for the equipment *NOT* to conform to the specifications. Such analysis leads to the absurd result of eliminating the third element from the test. *See, Shaw v. Grumman Aerospace Corporation,* 778 F.2d 736 (11th Cir. 1985).

Assuming the Court is convinced that there is at least a test that must be followed, it will find from the evidence not that the rotor system conformed to the specifications, but the abundance of evidence in the record tended to show nonconformity. (App. 2025-2026, 2016-2023, 1361, 1565-1569, 581-583, 1362-1363, 2069-2078). Once again,

whether the equipment conformed to specifications is a factual question to be answered by the jury. The jury in *Dowd* answered the question in the negative. This panel of the Court of Appeals misapprehends the law by substituting its judgment for that of the jury, thus denying Petitioners right to a jury trial.

11. (iv) The fourth element of the military contractor defense is that the supplier of the equipment must warn the United States about dangers involved in the use of the equipment that were known to the supplier but not to the United States. Thus, in *Dowd,* Bell has the burden of establishing by a preponderance of the evidence that it warned the Army of all dangers involved in the use of helicopters equipped with the 540 rotor system that it knew of and which the Army did not. At least two recent courts have correctly acknowledged that this duty extends to the supplier with regard to dangers about which it knew *or should have known. Trevino v. General Dynamics Corporation,* 626 F.Supp. 1330, 1338 (E.D. Tex. 1986) (emphasis added) *and Mackey v. Maremount Corp.,* 504 A.2d 908 (Pa. 1986).

12. The record indicates that the Army did in fact investigate and analyze incidents of mast bumping in the early 1970's. *Dowd v. Textron, supra* at 412. However, the evidence and common sense both reflect that the Army would not have continued to use the system—and would certainly have required the system to be altered with the mission modifications of 1978—if they had determined it to be unsafe (App. 1260). The Army continued to use the rotor system on Bell's tests and assurances that the rotor system was safe. Thus, there is ample evidence in

the record to support the conclusion that Bell did not warn the Army of all of the dangers about which it knew. Clearly, it did not warn of danger about which it should have known.

13. If Petitioner's had had the burden on this issue, they would have met it. However, as with the preceding elements, the heavy burden rests upon the defendants asserting the defense. The record provides sufficient evidence for the jury to find that Bell did not meet its burden. Accordingly, the Court erred in substituting its opinion as to this element for the jury.

The Court of Appeals seemed somewhat impressed by Bell's arguments that Bell proposed and the Army rejected certain modifications that might reduce mast bumping. *Dowd v. Textron, supra* at 411. However, it is unclear why the Court found this important. Instead, the Court's language is indicative of yet another place where the Court ignored both the record and the jury verdict and relied on the claims of the defendants. In addition the record was devoid of any evidence of rejection by the Army. The Court thus erred on three levels. *First,* the evidence is conflicting as to whether any of the three modifications would cure the design defect. The jury had sufficient evidence to determine that they would not. *Second,* this Court errs in its assumption that a sound proposal could be implemented by the Army without further action. This is contrary to the uncontradicted evidence that the Army can act only *after* the supplier has properly filed an Engineering Change Proposal with the Army. Bell never filed such a proposal; thus, the Army never rejected a Bell modification proposal (App. 586, 706).

14. *Third,* assuming that a consideration of this issue is appropriate, the Court has crossed over into the very area it claims to be forbidden. The Court's language, coupled with its holding, makes it clear that it disagreed with what it considers to be the Army's reasons not to adopt Bell's proposed modifications. *Dowd v. Textron, supra* at 411-412. This is exactly the type of second-guessing which the Court later states is impermissible. *Id.* at 412. Thus, the Fourth Circuit is in conflict with other circuits and also itself.

15. The Court decided both *Tozer* and *Dowd* on the same day. The Court reversed the district court in both cases for the same theoretical reasons. In the trials of both cases, the district court judge recognized that the military contractor defense differs slightly depending on whether the plaintiff's theory of recovery is based on negligence or strict liability in tort.

The jury verdict clearly establishes that the jury did not find that the defendant met its burden with regard to the elements of the military contractor defense in either form. The district court judge's post-trial memorandum in *Dowd* acknowledges that the jury returned general verdicts against Bell on both a strict liability count and a negligence count. The strict liability action contained an instruction on the defense which the fourth circuit approved. *Dowd v. Textron, supra* at 410-411. In returning a verdict against Bell on this count, the jury rejected the defense. The language of the instruction for strict liability is broader than for negligence. In fact, the former encompasses the latter. Therefore, it is obvious that a rejection of the defense as given for the strict liability

action is a rejection of the defense for the negligence action as well. Thus, the failure by the trial judge to word his instructions identically was harmless error. This is an overlooked point of law which warrants the granting of a rehearing.

Even if a Court determines that identical broad instructions are required, and even if it determines that the instruction on negligence is in error, the order by the fourth circuit is still inappropriate. Whether the Army approved the equipment specifications is an issue of fact to be determined by the jury. While the Court may persist in its contentions that military judgments should not be second-guessed by civilian juries, there is no doubt that juries must still be called upon to determine the issues of fact contained within the elements of the military contractor defense. Whether the government approved of the specifications is one such issue of fact. Therefore, the Court should have remanded the issue for a factual determination. To remand with directions that judgment be entered for the defendant (*Dowd v. Textron, supra* at 413) is to deny petitioners their constitutional right to a trial by jury.

16. Finally, by granting the petition, this Court has the opportunity to head off a growing conflict with other jurisdictions. Although *Dowd* and *Tozer* both raise the military contract defense, the two cases are not factually identical. However, they were decided the same day under the same theory of government contractor immunity. In the present case, the jury determined the government (the Army) did not approve the specifications, and in fact Bell did not meet their own specifications, and further,

Bell failed to warn the Army of dangers involved in the use of the helicopter that were known to Bell, but not to the Army. Only the appellate court determined the opposite when it substituted its judgment for the jury's.

17. The above analysis raises the problem that, if not corrected, will leave the United States Court of Appeals for the Fourth Circuit in conflict with other jurisdictions. Furthermore, it would have, for all practical purposes, eliminated the four part military contractor defense and substituted a one-part burden of proof for plaintiffs of *Willful Suppression* on the part of the contractors. It is illogical to allow the slightest bit of government approval to shield a government contractor who would otherwise be liable for damages under theories of negligence or strict liability. The purchase and use of a patented product should not be approved of that product's specifications. This has been recognized expressly and implicitly in other jurisdictions. *See, Shaw, supra; Mackey v. Maremont Corporation*, 504 A.2d 908 (Pa.1986); *In re Agent Orange*, 534 F.Supp. 1055 (E.D.N.Y. 1982); *and Trevino v. General Dynamics Corp.*, 626 F.Supp. 1330 (E.D. Tex. 1986). This Court must place a reasonable limit upon what constitutes "government approval." To refuse will allow government contractors to avoid liability for their negligent conduct which leads to the deaths of American servicepersons.

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Prayer for Relief

For the foregoing reasons Petitioners respectfully requests that this court grant their Petition for a Writ of Certiorari.

Respectfully submitted,

FLETCHER N. BALDWIN, JR.
Holland Law Center
University of Florida
Gainesville, FL 32611
(904) 392-2211

JOHN H. GREEN
418 North Texas Avenue
Odessa, Texas 79761
(915) 332-0588

Attorneys for Petitioners

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CATHERINE ELLIS, et al.

v.

BELL HELICOPTER TEXTRON, INC. — CIVIL ACTION NO. N-82-1341

* * * * *

DONNA, DOWD, et al.

v.

BELL HELICOPTER TEXTRON, INC. — CIVIL ACTION NO. N-82-1340

MEMORANDUM

On January 31, 1985, a jury returned a general verdict on counts of strict liability and negligence against Bell Helicopter Textron, Inc. for its design of the "teetertotter" rotor system installed on a AH-1S Cobra military helicopter. "Mast-bumping" caused the "teetertotter" rotor to sever the mast, precipitating the accident that killed the plaintiffs' decedents, military pilots Commander Dowd and Lieutenant Ellis. In lay terms "mast-bumping" is the contact of the motor with the mast. The rotor is the system of horizontal blades whose revolutions supply the force to support the helicopter's flight. The rotor is attached to the top of a rotating cylinder, or mast. Mast-bumping occurs when the rotor dips at an extreme angle, and the mast remains stationary relative to this dip allowing contact between the rotor's hub and the mast. In flight such contact is generally catastrophic because

the revolving rotor strikes the mast at such high speeds and with such force it causes the mast to fail or break up, and lose the rotor. The helicopter then loses the ability to remain in flight, and plummets downward. In this case, the separated rotor flew off and cut through the cockpit killing the pilots instantly.

Defendant Bell Helicopter Textron moves for judgment notwithstanding the verdict or, alternatively, a new trial. The motion is based upon objections to jury instructions given, or not given.

I THE PRESUMPTION OF DUE CARE

Defendant claims that the Court erroneously instructed the jury that the pilots were presumed to have acted with due care before their death. The Court's exact instruction should not be taken out of context. It was given in the Court's instruction on contributory negligence:

> Now, the user of a product must exercise reasonable care with reference to—must exercise reasonable care—with reference to defects or dangerous conditions about which he knows and understands or about which he should know and understand. Failure of the user of the product to exercise reasonable care is negligence. In this case, if you find a decedent failed to use reasonable care when operating the helicopter and knew or should have known of the alleged dangerous defect, then you should find that they were negligent in the use of the product, and your verdict on negligence must be for Bell Helicopter if the pilot's negligence contributed to the accident. *The pilots are presumed, absent countervailing evidence, to have exercised due care.* Bell Helicopter has the burden of proving that Major Dowd or Lt. Ellis were negligent in the use of the helicopter. (emphasis added).

Given in this context the instruction is little more than a restatement of the burden of proof for contributory negligence in Maryland. Furthermore, the particular presumption at issue is consonant with Maryland law in wrongful death actions. Because the decedent is unable to testify on his own behalf, he is entitled to a presumption of due care absent countervailing evidence. *E.g., Gresham v. Commissioner of Motor Vehicles,* 256 Md. 500, 503-08, 260 A.2d 649, 651-54 (1970). This Court was therefore required to give the instruction.

II SUPERSEDING AND INTERVENING CAUSE: THE MONDSHOUR CASE

Defendant requested and did not receive this instruction:

> You are instructed that even if you find that the helicopter was defective as originally manufactured, your verdict must still be in favor of Bell Helicopter if you should also find that during the interval between the original delivery of the aircraft as an AH-1G and the time of the accident that certain safety devices that may have prevented the accident were developed and made available, but were not installed by the Army. The failure of the purchaser, the U.S. Army, to purchase and install the safety devices would constitute a superseding intervening cause, and Bell Helicopter would not be liable under the law.[1]

Instead, the Court gave the following instruction to the jury within the Court's definition of proximate cause:

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[1]Not only does this instruction incorrectly present the law, but it picks out and emphasizes certain events from the evidence. The Court leaves such emphasis to jury argument.

> The connection between a defendant's negligence and the plaintiff's injury may be broken by an intervening and superseding cause. An intervening cause supersedes the operation or proximate cause of a defendant's negligence when it alone produces the injury. But the proximate cause connection is not actually broken, if the intervening event is one which might, in the natural and ordinary course of things, be anticipated as not entirely improbable, and that the defendant's negligence is an essential link in the chain of causation.

The defendant objects to this instruction, arguing that a finding of the Army's failure to order the installation of devices to prevent "mast-bumping" during the aircraft's modification would *ipso facto* supersede any negligence of Bell's in designing the rotor system. The defendant advances *Mondshour v. General Motors Corporation,* 298 F. Supp. 111 (D.Md. 1969), in support of this assertion. In *Mondshour,* the Court granted a motion to dismiss to the defendant manufacturer of a commuter bus designed, built and sold in 1948. The plaintiff contended the bus was negligently designed because the bus had a rearview mirror on the driver's left side but not on the right side. This purported design flaw allegedly caused the accident at issue in 1965. The Court first expressly found that the manufacturer was not negligent in the design of the bus. *Id.* at 114. As an alternate holding, the Court then found that, in any event, a superseding intervening cause terminated any potential liability of the manufacturer. The superseding intervening cause was the failure of the owner to install after, seventeen years of possession of the bus, an extra rearview mirror. The Court specifically applied the general rule of foreseeability that "the original wrongdoer's liability [can] be terminated by later events if those

events were not foreseeable." *Id.* The necessary element of foreseeability is likewise applied in the Court's instant jury instruction. This is an element required by Maryland law. *E.g., State v. Hecht Company,* 165 Md. 415, 421, 169 A. 311 (1933).

The fact situations vary significantly between *Mondshour* and the instant case. In *Mondshour,* the unforeseeable supervening negligence was the failure to install an extra rearview mirror. This is a matter of relatively little money and labor. Here, the alleged unforeseeable supervening event was the alleged negligent failure of the Army to have a collar, hub spring or four-bladed rotor installed on the helicopter. This could have cost the Army a significant amount of time and money. A jury could reasonably find the Army's actions to forego added safety features to have been foreseeable.

III THE DEFENSE PRODUCTION ACT

Defendant claims that the Defense Production Act of 1950 (DPA), 50 U.S.C. app. §§ 2061, 2157 precludes the liability of a military contractor in this suit. The Court has previously denied before trial the relevance or applicability of this statute to an action in tort. The defendant cites no authority for the novel proposition that the DPA grants immunity to government contractors for tortious actions. The purpose of the Act was to facilitate "diversion of certain materials and facilites from civilian use to military and related purposes." 50 U.S.C. app. § 2062. It provides "the President with authority to accomplish these adjustments in the operation of the economy." *Id.* To this end, the government gains priorities to production and resources, even to the extent of cutting off the contractual

rights of other parties. It is clear that it was enacted to effect commercial and economic relationships. The immunity section of the statute, of course, applies only to those activities within the express reach of the DPA. Tortious activities are not so encompassed. The only reported cases under this section either have not considered or have not allowed the DPA as a defense to tort. *In Re Agent Orange Product Liability Litigation,* 597 F.Supp. 740, 843-45 (E.D.N.Y. 1984).

IV THE MILITARY CONTRACTOR DEFENSE

The final and most significant controversy remaining in this case is the challenge to the Court's application of the "military contractor"[2] defense to the action for negligence.

The Court accepted defendant's argument that the "military contractor defense" applied to strict liability in this case. The defense, as set forth by the Ninth Circuit in *McKay v. Rockwell International Corp.,* 704 F.2d 444 (1983), extended immunity from strict liability to the manufacturer and designer of allegedly defectively designed military equipment where:

1. the United States is immune from liability under *Feres* and *Stencel;*

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[2]Although known generally as a "government contractor" defense, it should probably be labeled "military contractor" defense because of its particular development from the *Feres, Stencel* and *McKay* cases discussed *infra.* Justifications advanced in *McKay,* for instance, are explicitly grounded in the consequences of judicial oversight of military activities. This goes beyond the traditional justifications for the governmental contractor defense. Furthermore, the standard to be applied from *McKay* is materially different from the traditional government contractor standards. This Court will henceforth use the term "military contractor defense."

2. The supplier proves that the United States established, or approved, reasonably precise specifications for the allegedly defective military equipment;

3. the equipment conformed to those specifications; and

4. the supplier warned the United States about patent errors in the government's specifications or about dangers involved in the use of the equipment that were known to the supplier but not to the United States.

Id. at 451.

This standard was given in the Court's instruction to the jury on the military contractor defense to the count for strict liability. Of course, defendant Bell Helicopter does not object to this portion of the Court's instructions.

This Court, however, relying in part on a prior ruling of this District Court's Judge Herbert F. Murray in *Tozer v. LTV Corporation,* 18 Avi. 18,212 (D.Md. July 25, 1984), did not give this same instruction on the contractor defense for the count for negligence. Treating strict liability and negligence as the same for purposes of the military contractor defense was rejected by Judge Murray because "[w]here the injury-causing aspect of the product was neither designed by the government, nor mandated or compelled by the government contract, there does not appear to exist any sound public policy for immunizing the contractor for his own negligent acts." *Id.* at 18,216.

In *Tozar,* as in this case, the "defendants are asking the court to extend . . . immunity to a negligent contractor merely because the government in approving the detailed specifications established by the contractor somehow adopted the contractor's negligent design, and thereby made the negligence its own." *Id.*

This Court instead varied the *McKay* military contractor defense in one crucial way for negligence. Rather than merely showing military establishment or approval of reasonably precise specifications, the contractor must show "that by the contracts pursuant to which the helicopter's rotor system was built or modified, the Army designed or mandated or compelled *design* of the rotor system, specifically, the particular parts which plaintiffs claim were negligently designed, to be installed on the helicopter." (Court's instructions to the jury on the government contractor defenses for negligence).

Defendant's objections to this instruction are two: (1) that the exact McKay military contractor defense instruction should be identically applied to strict liability and negligence; and (2) that even if the Court is correct in designing a different standard for negligence, the instruction as given "was inapplicable to the claims in this case." (Defendant's Memorandum in Support of Motion for Judgment Notwithstanding the Verdict or for New Trial, p. 18).

The Court will address the second argument first. Defendant avers, on different grounds, that the Court misunderstood the facts in the case, and consequently misinstructed the jury.

Defendant first appears to be advancing the theory that this case was only about the modification contract whereby Bell Helicopter installed on the AH-1S helicopter at issue, a 540 rotor system then in the possession and custody of the Army. If this were so, this case would never have gone to trial. There was never any contention that Bell was negligent in the mere act of installing this particular rotor system pursuant to the modification contract.

Bell Helicopter, however, originally designed and manufactured the 540 rotor system installed on this helicopter. Bell admits "the 540 Rotor System was designed by Bell in the early sixties—the mast was designed by Bell in the mid-sixties. The Army did not compel or mandate the original design, but did specify that those particular components be installed on its helicopters." (Defendant's Memorandum, p. 20). The design and manufacture of the 540 Rotor System was the central issue of this litigation, not the subsequent reinstallation of that system on a modified helicopter. The design of the rotor system—to be specific, the character, qualities and performance of the "teeter-totter" rotor system design—did not change in this case when the rotor system was eventually installed on a helicopter model different than the model it was originally assembled for. The lengthy evidence put on relating to the modification of the AG-1G into an AH-1S may be indispensable to understanding the history and function of the helicopter involved in the crash, but it nevertheless is only background to the issue of whether the aircraft's "teeter-totter" rotor system was negligently designed by Bell.

Indeed, the real purpose of this attack on the military contractor instruction's focus on design is to call attention once again to the purported negligence of the Army. Defendant restates the contention that the Army's negligence in demanding the re-installation of this defectively designed rotor system on the AH-1S intervenes and supersedes any negligence on the part of Bell in originally designing the rotor. Bell's argument is thus:

> The issue as charged by the Court in this case was the *design* of the particular parts—hub and mast.

> Bell, of course, designed them without initial compulsion from the Army. The plaintiff showed that Bell also designed three allegedly safer designs—the plug, four bladed rotor and the hub spring. The issue was not what was designed as alternatives, or who designed the alternatives, but who chose to configure the AH-1S without those alternatives and with the *particular parts* which were on it. The Army did. That constitutes a defense for the military contract. (Defendant's Memorandum, p. 21).

As stated before, regardless of the modification contract, no credible argument exists that the rotor's design was not the central and critical issue. Thus, what is the "defense for the military contract" provided by the Army's choice to configure the AH-1S without the alternative safety parts? Obviously, the defense of intervening and superseding cause.

Bell further asserts that it was required by law to enter into and perform the AH-1S contract. Whether or not this is true, this compulsion to design the rotor system. If Bell had refused to enter into or perform the AH-1S contract, another competitor most assuredly would have. If *that* non-Bell competitor had been compelled to install the defectively designed rotor system, *that* competitor would probably be immune from liability under the military contractor defense. The designer, however, of the non-compelled defective design would not.

All of the following assertions made by Bell are correct: the Army did enter into a contract with Bell to *inter alia* install an Army requisitioned 540 Rotor System ("teeter-totter") on the AH-1S helicopter; the Army did not request or order installment of any of the available safety devices mentioned above, despite knowing some-

thing of the existence and/or efficacy of these devices; and, finally, Bell was not allowed under the contract to install such devices without the permission of the Army. Once, however, Bell designed and sold the defective rotor system at issue to the Army, Bell's negligence, except for a proximately caused injury, was essentially complete. Whatever the Army subsequently did with the defective rotor system it now owned goes to the issue of the Army's negligence, not Bell's. Bell never had any right to recall and modify the defective product once sold because Bell had, in this instance, sold all its ownership rights in the product. Certainly, however, an offer to recall and modify would tend to cut off Bell's negligence as the proximate cause of injury. Yet the issue of whether Bell ever offered to recall and modify the allegedly defective product was not actually before the Court. Bell certainly offered to add safety devices—but only at a cost and as part of normal profit-making activities. This is not an admission of defect. Nor is it unforeseeable that the buyer and owner of a defective product might not wish to subsequently pay out more to fix the seller's defect. Furthermore, there was a genuine factual dispute at trial, brought out again at the post-trial motions hearing, about what exactly the Army knew of the defect at issue.

Certainly, if the Army had clearly known of the design defect, the severity of the injuries the defect caused, and the reasonable availability of safety devices, there is a serious argument to be made that the Army was also negligent. If one assumes that the Army was indeed negligent, then whether the Army's negligence relieves Bell of liability for its own negligence is a question of intervening and superseding cause as discussed previously.

Bell also argues that it was denied the full breadth of the military contractor defense because of the Court's failure to include the term "manufacturing" in the instruction as a potentially immunized activity. The Court first refers Bell to its own memorandum:

> In *Tozer,* Judge Murray correctly observed that the Government Contractor Defense is not intended to protect a contractor from negligent *manufacture* or negligent *performance of duties* under a contract.

(Defendant's Memorandum, p. 16) (emphasis in original).

If Bell concedes that Judge Murray was correct, why is it now arguing that this Court was wrong for following the exact same principle? If by "manufacturing" one means the physical construction of the product apart from the design (and this would be the implication because "design" is a separately mentioned act), a manufacturer who negligently left out a bolt required by the design specifications has negligently manufactured the product, but has not necessarily negligently designed the product. If there is immunity available for "manufacturing" as just defined, then we strike the requirement of the military contractor to follow the government-compelled design, or even the government-approved specifications. The justification for the defense as discussed *infra* collapses when we remove this requirement.

Perhaps by "manufacturing" defendant is merely offering another word for "design." This Court avoided embellishing the instruction with different words for "design" because of the confusion it might create. To return to the example of the missing bolt, if the jury found from the evidence that the helicopter was negligently manu-

factured because a required bolt was missing, then as stated above, there is no military contractor defense available. If the jury found from the evidence that a bolt required to make the aircraft safe was negligently left out of the design, the military contractor defense may be available. It is thus necessary to distinguish between the activities of manufacturing and design.

Defendant's further objection that the term "manufacture" was used in the general instructions on negligence is pointless. A jury may, of course, consider what was actually manufactured, as well as what was designed to be manufactured, when determining negligence. The presence of the term in the general instructions and its absence in the instruction on the contractor defense is not, as defendant argues, confusing and prejudicial. On the contrary, it confirms the distinction between the activities of "designing" and "manufacturing" necessary to make this type of case coherent—a distinction absolutely necessary to the application of the military contractor defense. *McKay v. Rockwell Int'l. Corp.*, 704 F.2d 444, 448 n.6 (9th Cir. 1983).

Finally, defendant does not proffer that the government ever mandated or compelled the "manufacture" of the 540 Rotor System, only "manufacture" of the modified helicopter on which the rotor system was subsequently re-installed. As previously discussed, the AH-1S modification does not confer any immunity for the original manufacture of the 540 rotor system.

The Court now reaches the most important question raised by this case. Under what circumstances does a producer of military goods and equipment share the same

immunity as the United States military from suits by military personnel? The issue at bar concerns the availability of the immunity for military contractors established by the Ninth Circuit in *McKay v. Rockwell Int'l. Corp.*, 704 F.2d 444 (9th Cir. 1983).

To understand the arguments in *McKay* and related cases, it is necessary to discuss the legal background upon which these cases were decided. *McKay* refers to the defense it provides for military contractors as a "government contractor" defense. This defense is rooted in the doctrine of sovereign immunity.

The United States enjoys sovereign immunity, or immunity from suit without its permission. *E.g., Williams v. United States,* 289 U.S. 553, 575-77 (1933). "The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretension to a compulsive force. They confer no right of action independent of the sovereign will." *Hans v. Louisiana,* 134 U.S. 1, 13 (1890), *quoting* The Federalist No. 81 (A. Hamilton). Whether the doctrine is based on a metaphysical or a political theory of the inherent nature of sovereignty, or on purely practical or historical reasons, it is a well-established principle. *Keifer & Keifer v. R.F.C.*, 306 U.S. 381, 388 (1938).

Sovereign immunity is extended to cover the acts of "a public agent who acts pursuant to the command of a legal percept, [and] can justify his act by the production of such precept." *Den v. The Hoboken Land and Improvement Co.*, 59 U.S. (18 How.) 272, 283 (1856). The government contractor defense is such an extension. The government contractor defense was confirmed by the Su-

preme Court in *Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18 (1940), where a contractor requested immunity from the damages caused by the dikes he had constructed where the dikes were built pursuant to a contract "with the United States Government, and under the direction of the Secretary of War and the supervision of the Chief of Engineers of the United States . . . as authorized by an Act of Congress." *Id.* at 19. The Supreme Court affirmed the Eighth Circuit's finding that the contractor's actions were "authorized *and directed* by the Government of the United States." *Id.* at 20 (emphasis added). The contractor was thus entitled to treatment as an agent or officer of the government, immune from personal liability.

The standard to be applied by which the government contractor may enjoy immunity has not been uniformly developed. But these variances are more of language than basic principle. A recurring basic principle, variously explained, is a requirement that the government "compel" or "direct" or "design" the construction, manufacturing or other activity at issue. *E.g., Merritt, Chapman & Scott Corp. v. Guy F. Atkinson Co.*, 295 F.2d 14, 16 (9th Cir. 1961) (compulsion is a necessary element of the government contractor defense); *Johnson v. United States*, 568 F.Supp. 351, 356 (D.Kan. 1983) (the government contract defense only applies where the injury-causing aspect of the product was mandated by the contract); *In Re Agent Orange Product Liability Litigation*, 534 F.Supp. 1045, 1055 (E.D.N.Y. 1982) (the government contract defense applies where the government establishes specifications and the contractor meets those specifications in all respects); *see Hargrove v. Int'l. Harvester Co.*, No. 82-2015 (4th Cir. May 24, 1983) (government contractor defense

applies where the government designed and provided specifications for the product).

This element of governmental "compulsion," however, was eschewed by the Ninth Circuit in *McKay v. Rockwell Int'l Corp.*, 704 F.2d 444 (1983), where a strict liability claim was brought against the RA-5C airplane's designer and manufacturer by the representatives of two Navy pilots killed by allegedly defective ejection systems in the airplane. The previous Ninth Circuit holding in *Merritt, supra,* and "all the cases relied upon by the *McKay* majority, which apply the [government contractor] defense, found some factor which compelled the contractor to act as they did." *McKay, supra,* 704 F.2d at 458 (Alarcon, J., dissenting). The Ninth Circuit's new *McKay* standard, however, only required the military to establish *or approve* reasonably precise specifications for the allegedly defective military equipment. *Id.* at 451 (emphasis added). Rockwell, thus did not have to show any compulsion behind the design to benefit from the military's immunity. *Id.* Yet the *McKay* majority avoided expressly announcing the demise of *Merritt* and the compulsion requirement. The Ninth Circuit only narrowly avoided openly confirming that it had jettisoned the *Merritt* "compulsion" requirement by purportedly distinguishing *Merritt* on the facts. The Court noted that in *Merritt* detailed specifications were absent whereas in *McKay* the government "reviewed and approved a detailed set for specifications." *McKay, supra,* 704 F.2d at 450. *Merritt* would still be controlling where the specifications were not detailed. *Id.* There is no indication, however, as to why or how the Court reasoned that submitting specifications in detail alleviated the *Merritt* requirement of

some element of governmental compulsion. It remains the contractor's non-compelled design and product whether detailed or not.

Recently, the Third Circuit addressed whether *McKay* had abrogated the traditional requirement of governmental compulsion. *Koutsoubos v. Boeing Vertoil,* 755 F.2d 352 (3d Cir. 1985). The court was concerned that without proof of compulsion, there would be no justification for the defense. The contractor would no longer be the government "agent" described in *Yearsley,* but only a private entrepreneurial entity freely designing and selling its goods in the marketplace. In *Koutsoubos,* the Third Circuit, however, found this concern satisfied: the Navy had engaged in a "continuous back-and-forth" with the company, and exercised final authority over the specifications. *Id.* at 355. This finding does not, however alter the fundamental change wrought by *McKay* that the government need not compel or establish design, but merely approve it. The final authority over the specifications mentioned above in *Koutsoubos* is only the ability to approve or reject the contractor's specifications or design.

It is evident, therefore, that *McKay* represents a significant departure from the traditional government contractor defense. Indeed, to be exact, the *McKay* standard is really not the government contractor defense at all, despite some similarity in structure and origin. Rather, *McKay* represents a military contractor defense, or to be more precise, a defense for suppliers of military equipment exclusively against the actions of servicemen for injuries caused by the equipment arising out of or in the course of activity incident to service. *Johnson v. United States,* 568 F.Supp. 351, 358 (D.Kan. 1983).

The *McKay* standard's purposes are expressly drawn from *Feres v. United States,* 340 U.S. 135 (1950) and subsequent cases. In *Feres,* the United States was found immune from suits by servicemen for negligence where the injury arose out of or was in the course of activity incident to service. *Id.* at 146. Following *Feres,* the Supreme Court has consistently denied personal injury suits against the military by servicemen because of "[t]he peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline . . . ," *United States v. Brown,* 348 U.S. 110, 112 (1954), specifically the requirement that "the habit of immediate compliance with military procedures and orders . . . be a virtual reflex with no time for debate or reflection." *Chappell v. Wallace,* — U.S. —, —, 103 S.Ct. 2362, 2365 (1983). "Civilian courts must, at the very least, hesitate long before entertaining a suit which asks the court to tamper with the established relationship between military personnel and their superior officers. . . . " *Id.* at —, 103 S.Ct. at 2365. This is known generally as the *Feres* doctrine.

But, where there is also involvement on the part of a private military supplier or contractor, the injured serviceman often sues the supplier. Previous to *McKay,* the supplier or contractor could successfully invoke the government contractor defense if it met the general requirement of "compulsion" as previously discussed. When military contractors provided the specifications and design, and the military merely approved them, immunity was not available to the contractor. Thus, although by ordinary standards of negligence or strict liability the military might be as culpable as the manufacturer or sup-

plier, the military retained an immunity under the *Feres* doctrine from suit by the serviceman that the contractor did not share.

In *Stencel Aero Engineering Corp. v. United States,* 431 U.S. 666 (1977), the military contractor attempted to cross-claim against the United States for indemnification in a suit for negligence brought by a national guardsman injured during the course of duty. The manufacturer argued that because the indemnity action was not brought by a serviceman it would not have the effect on military discipline "that might result if the soldier were allowed to hale his superiors into court." *Id.* at 676 (Marshall, J., dissenting). The Supreme Court rejected the distinction and found that:

> [W]here the case concerns an injury sustained by a soldier on duty, the effect of the action on military discipline is identical whether the suit is brought by the soldier directly or by a third party. The litigation would take virtually the identical form in either case, and at issue would be the degree of fault, if any, on the part of the Government's agents and the effect upon the serviceman's safety. The trial would, in either case, involve second-guessing military orders, and would often require members of the Armed Services to testify in court as to each other's decisions and actions.

Id. at 673.

The reasons advanced by *McKay* for its holding are expressly grounded in *Feres-Stencel* concerns. In brief, *McKay* outlined the following factors: (1) despite the holding of no indemnification in *Stencel,* the contractor would still pass the cost of accidents off on the United States by cost overruns or higher prices on military equip-

ment; (2) to hold military suppliers liable for defective designs where the United States set or approved the design specifications would thrust the judiciary into the making of military decisions; (3) in setting specifications for military equipment, the United States is required by the exigencies of our defense effort to push technology toward its limits and thereby incur risks beyond those that would be acceptable for ordinary consumer goods; and (4) the military contractor defense provides incentives for suppliers of military equipment to work closely with and to consult the military authorities in the development of equipment. *McKay, supra,* 704 F.2d at 449-50. These justifications were analyzed in *McKay* only in the context of strict liability, not as they pertain herein to negligence. Nor is negligence so identical to strict liability as to make separate inquiry unnecessary.

In the 1960's strict liability became widely-accepted as a cause of action in tort against manufacturers and suppliers of defective consumer goods. This extension of strict liability was neither sudden nor unanticipated, and is adequately chronicled elsewhere. *See e.g.,* McKean, *Product Liability: Trends and Implications,* 38 U. Chi. L. Rev. 3, 6-20 (1970); Prosser, *The Fall of the Citadel* (Strict Liability to the Consumer), 50 Minn. L. Rev. 791 (1966). Perhaps nothing better confirmed the trend than the adoption of a strict liability doctrine for products by The American Law Institute in section 402A of the Second Restatement. Restatement (Second) of Torts, § 402A (1965). Maryland adopted section 402A and applied it to design defects in *Phipps v. General Motors Corp.,* 278 Md. 337, 363 A.2d 955 (1976). The Maryland Court of Appeals noted approvingly the easier burden of proof available

to an injured consumer under strict liability. Attempting to minimize the actual differences between strict liability and negligence, the Court characterized strict liability as negligence *per se*. *Id.* at 350-51, 363 A.2d at 962-63. The injured consumer could prove liability for a defective product without actually having to show acts or omissions amounting to fault on the part of the seller. The Court further noted that a persuasive reason for adopting 402A was "that public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained. . . ." *Id.* at 352, 363 A.2d at 963, *quoting with approval,* Restatement (Second) of Torts § 402A, comment c (1965).

The differences between negligence and strict liability should not be underemphasized. Negligence has neither originated from nor evolved around concepts of spreading product injury risks and costs to producers (and thus eventually to the public at large). It focuses on whether a person's conduct breaches a duty of reasonable care toward others. The traditional standard by which negligence is measured is the standard of the "reasonable man," or in this case, the "reasonable manufacturer." To make this determination, a jury is not simply asked to apply an established set of principles. Certain guidelines and concepts may be given or suggested to the jury, but ultimately the "reasonable manufacturer" is a cipher with no form outside the collective judgment of the jury. In strict liability, the jury does not consider, and approve or censure the conduct of another; rather the jury determines whether a product is unreasonably dangerous to a consumer.

The focus in negligence is, thus, on the producer and in strict liability on the product. When a jury finds a manufacturer negligent, it has determined that the manufacturer's actions were wrong and unreasonable. It is not necessary to make this judgment in strict liability. Indeed a non-negligent manufacturer may often be strictly liable for an unreasonably dangerous product. There is nothing inherently contradictory about this. A manufacturer can still make an unreasonably dangerous product even though that manufacturer may have utilized the best available production and design—that is, behaved in a manner we cannot fault as negligent or unreasonable. Yet the product can be found to be, in ways no one may have originally foreseen, unreasonably dangerous to the consumer. The consumer may suffer devastating injury or loss due to the defect. It is in this situation that strict liability has the character of a system based on cost or risk-spreading rather than one based on culpability or fault.

Danger, not fault, is the gravamen of strict liability. Thus, when a jury finds a manufacturer strictly liable, it has not necessarily censured that manufacturer for wrongdoing. On the other hand, a finding of negligence makes such censure inescapable.

This Court is thus asked to relieve Bell Helicopter of the consequences of its negligence merely because the United States Army approved Bell Helicopter's design. This is a dramatic departure from the traditional government contractor defense. This Court is willing to accept this standard for strict liability where no wrong on the part of the manufacturer is necessarily found or implied, but balks at its application for negligence.

Because *McKay* did not actually involve negligence, the justifications for its holding must be analyzed herein as they apply to negligence. One *McKay* concern, as previously noted, is indirect cost-spreading. Cost-spreading is where the losses of the injured individual consumer are absorbed by the manufacturer and eventually recouped in an adjustment in the price of the goods. All of us collectively as consumers eventually "compensate" the individual injured consumer. In military products, the injured person is the serviceman. The consumer, however, that pays the upwardly adjusted prices is the military. The military, thus, becomes indirectly liable to the injured serviceman and this purportedly violates *Stencel.*

Cost-spreading, as previously discussed, is a central policy of strict product liability. Theoretically, at least, strict liability does not disadvantage or distinguish one producer over another as much as negligence would. Negligent manufacturers of attack helicopters will incur far greater liability losses than non-negligent manufacturers of attack helicopters, but all manufacturers of attack helicopters would have more or less proportionally similar losses caused by strict liability because one's conduct cannot be so readily adjusted or controlled to avoid strict liability. Thus, the negligent manufacturers, in theory at least, would eventually have to charge distinctively higher, and less competitive, prices than their non-negligent competitors, or absorb the losses themselves. Charging higher simply guarantee the Army does not buy the product, and prices, of course, instead of absorbing the losses, might cost-spreading is avoided, or at least alleviated. This is admittedly too theoretical an argument to be always reliable. On the other hand, it may often be in effect.

The Court acknowledges that whatever the tort action, strict liability or negligence, eventually the military may incur some of its cost. *McKay* only proposes to limit it more, and this Court and *Tozer* propose to limit it somewhat less than *McKay*. The concern, however, cost-spreading should be given is not particularly apparent from the *Stencel* decision. Indeed, the cost-spreading argument made by *McKay* is not expressly made in *Stencel*. There is no concern actually present in *Stencel* about the price of military equipment. The *Stencel* Court instead expressly based its decision on traditional *Feres* concerns—the fortuity of varying state standards of torts in controlling service-related injuries, and above all else, military discipline. *Stencel, supra,* 431 U.S. at 672-73. We cannot thus give the *McKay* cost-spreading concern, with its only indirect and tenuous application, undue importance, particularly when asked to deny an individual the right to recover from another for injuries caused by the other's negligence or wrongdoing. Indeed, the reach of this cost-spreading argument, unlike *Feres* concerns, extends equally to civilians. This Court would not countenance civilians barred from suits against military contractors simply because it might raise the costs of military equipment.

Another reason given for the military contractor defense is to provide incentives for military suppliers to work closely with and consult military authorities in the development and testing of military equipment. This result, however, is equally true of the traditional government contractor defense. Indeed, if the *McKay* contractor only needs government approval of his design, it is not clear how closer consultation is encouraged. Conversely, the *McKay* defense does not discourage contractors from

committing negligence; indeed, it removes the incentives not to be negligent by making immunity easily available.

Determining in court whether military equipment is defective is also a concern of *McKay*. "Trials on design defects where government specifications are at issue would 'involve second-guessing military orders, and would often require members of the Armed Services to testify in court as to each other's decisions and actions.' " *McKay, supra,* 704 F.2d at 449, *quoting Stencel Aero Engineering Corp. v. United States,* 431 U.S. 666, 673 (1977). This concern is relevant *only* in the context of the effect on military discipline. *Id.* Trying Bell Helicopter in the instant case has brought the conduct of the military into court. Bell Helicopter has itself attempted to make a case for the Army's negligence as a superseding cause. Military decisions have been exposed to "second-guessing" and criticism. Unlike *Stencel,* however, neither the Army nor any of its personnel were or could be defendants in the lawsuit. Furthermore, Bell Helicopter may have argued the Army's negligence, but the servicemen did not. Indeed, it would almost always be in the interest of injured servicemen in cases like this *not* to "second-guess" the military's decision—to actually argue that the military's conduct was proper in order to rebut any defense by the contractor of intervening and superseding cause. This Court is thus appropriately skeptical of the purported effects on military discipline of allowing a serviceman an action against the non-compelled negligence of a private, profit-making entity.

The final justification made by *McKay* is perhaps the most novel, and controversial of all. It is essentially a "separation of powers" argument that asserts the judiciary, the civilian courts and the common and statutory

law of civil liability are institutionally and fundamentally inadequate and incapable of judging or regulating the usefulness, condition and safety of military equipment. "[I]t should be noted that in setting specifications for military equipment, the United States is required by the exigencies of our defense effort to push technology toward its limits and thereby incur risks beyond those that would be acceptable for ordinary consumer goods." *McKay, supra,* 704 F.2d at 449-50. This is not an argument along traditional lines of negligence to consider the nature of the activity in ascertaining its reasonableness. It is a justification for barring negligence suits whenever the military approves a contractor's design. It would be detrimental to national security, it follows, to allow the judgments of civilian courts and juries to analyze and determine the performance, safety and, subsequently, perhaps the future design of military technology by the ordinary principles of civil liability For reasons of national security, the military and military contractors are not merely immune as "sovereign" or its agents, but are simply not accountable for their actions under the ordinary principles of negligence. Contractors would essentially enjoy this status whenever the military approved of their decisions even when those decisions would be ordinarily negligent. The Court acknowledges the gravity of this argument but declines to accept it. This is not the "discipline" concern found in *Feres, Stencel* or *Chappell.* The appellate courts or Congress will have to instigate the radical departure from traditional concepts of civil liability and separation of powers the defendant is requesting. This Court will not.

In sum, the current requirement of compulsion in the military contractor defense for negligence clearly does not

disrupt or influence military discipline. *If* "cost-sharing" is, indeed, a real concern of the *Stencel* decision, it is rather problematic whether negligent manufacturers can effectively spread their liability losses. On the other hand, the *McKay* standard, if universally applied, will generally eliminate all civil liability in tort of military contractors to military personnel. This Court is willing to allow the elimination of strict liability where the military approves a military product's precise design specifications. Strict liability is based as much on "risk-spreading" as culpability. A reasonable compensation system for injured servicemen, normally requiring no litigation, is already in place. The Court is not willing, however, to allow the easy elimination of an action for negligence. When a serviceman can prove negligence, he proves the contractor has acted unreasonably and wrongly. The Court cannot relieve the contractor of this liability where the military never compelled the private, entrepreneurial entity to make and offer the defective product for profitable sale. Until the ordinary standards of and forums to determine negligence are waived for military contractors, this Court must hold Bell Helicopter responsible for the products it voluntarily designs and sells for profit, and are found defective causing injury to anyone.

/s/ Edward S. Northrop

Senior United States District Judge

28 May 1985

APPENDIX B

DOWD v. TEXTRON, INC.
Cite as 792 F.2d 409 (4th Cir. 1986)

TEXTRON, INC., a Delaware Corporation; Bell Helicopter Textron, Inc., a Division of Textron, Inc., a Delaware Corporation, Appellants.

No. 85-1704.

United States Court of Appeals,
Fourth Circuit.

Argued March 6, 1986.

Decided May 27, 1986.

Widows of servicemen killed in helicopter crash brought products liability suit against helicopter manufacturer. The United States District Court for the District of Maryland, Edward S. Northrop, J., entered judgment on verdicts for widows, and manufacturer appealed. The Court of (410) Appeals held that manufacturer was protected from liability under military contractor defense.

Reversed and remanded.

1. *Products Liability*

Elements of "military contractor defense" to action for design defect remain the same whether theory of recovery is one of negligence or strict liability; under either theory, government approval of equipment specifications, not design or dictation of them is all that is required.

See publication Words and Phrases for other judicial constructions and definitions.

2. *Aviation*

Helicopter manufacturer was protected from liability, under "military contractor defense," for alleged design defect in rotor system installed on helicopter which crashed and killed two servicemen, where United States was im-

mune from liability under *Feres* doctrine, Army had long and broad experience with the rotor system in question and continued using it without requestion or ordering installment of available safety devices, and where the contractor was not allowed to install such devices without permission of the Army.

James W. Hunt (James M. FitzSimmons, Mendes & Mount, New York City, R. David Broiles, Brown, Herman, Scott, Dean & Miles, George Galerstein, Fort Worth, Tex., Bell Helicopter Textron, Inc., Charles M. Shaffer, Jr., L. Joseph Loveland, Gary J. Toman, Jane E. Jordan, King & Spalding, Atlanta, Ga., on brief), for appellants.

John H. Green, Odessa, Tex., for appellees.

Before RUSSELL, HALL and WILKINSON, Circuit Judges.

PER CURIAM:

Two servicemen, Douglas Dowd and Robert Ellis, were killed when the helicopter they were flying crashed during a flight instruction session at Patuxent River, Maryland. Donna Dowd and Catherine Ellis, widows of the servicemen, brought suit on behalf of themselves and their children against Textron, Incorporated and its subsidiary Bell Helicopter Textron, the manufacturer of the helicopter. The plaintiffs alleged negligence and strict liability for the design of the rotor system installed on the helicopter. The jury returned a general verdict of $3,650,000 in favor of the plaintiffs, and the district court denied the customary post-trial motions.

We reverse. The defendant has satisfied all elements of the military contractor defense as set forth in *Tozer v.*

LTV Corp., 792 F.2d 403 (4th Cir. 1986). The decision of the United States Army to contract with Bell for a helicopter rotor system with which the Army had extensive familiarity and field experience operates to shield defendant from any liability for alleged design defects in that system.

I.

The crash occurred on May 21, 1981, during a "familiarization flight" at the U.S. Naval Test Pilot School at Patuxent River. The plaintiffs alleged that the accident occurred because the hub of the rotor system struck the mast and severed it, a phenomenon known as "mast bumping." The rotor is the system of blades that revolve to support the helicopter's flight. The rotor is attached to a rotating mast. If the rotor dips at an extreme angle and the mast remains stationary, the hub of the rotor may strike the mast and sever it. When mast bumping occurs in flight, it is generally catastrophic because the rotor separates from the mast, and the helicopter can no longer fly. In this case, the separated rotor flew off and the blades cut through the cockpit of the helicopter.

The helicopter flown by Dowd and Ellis had a 540 rotor system that Bell designed in the early 1960's, and installed on the UH-1 series of helicopters that it built for the Army between 1961 and 1967. In 1965, Bell developed the AH-1G helicopter, a de (411) rivative of the UH-1C, and installed the 540 rotor system on the AH-1 series as well. In 1978, the Army entered into a contract with Bell to modify the AH-1G to an AH-1S. The modification added mission equipment to the helicopter, the rotor system was not changed.

The mast bumping accident that occurred at Patuxent River in 1981 was not an isolated incident. Bell and the Army had previously investigated and exchanged information on the problem of inflight mast bumping. In 1973, the Army prepared a report on forty-six instances of mast bumping between 1967 and 1972. That report concluded that the teetering rotor system had unstable characteristics, and recommended further study of the problem. In 1974, the Army published a technical risk assessment report on inflight mast bumping with AH/UH helicopters. The 1974 report concluded that mast bumping was associated with maneuvers at low g levels and with "high speed flight with extreme nose left sideslip." The report recommended educating pilots about the potential for mast bumping during certain maneuvers and advocated a long-term investigation into redesign of the mast and rotor. While the Army was preparing its reports, Bell and the Army exchanged information on the design of the rotor system and pilot performance. Bell also did a series of intense studies.

In the late 1970's, Bell proposed three rotor system modifications that it hoped would reduce mast bumping: The hub spring, the mast plug, and the four-bladed rotor. The mast plug is inserted into the slow mast to provide additional resistance if the mast is bumped by the hub. The Army approved the mast plug modification for UH-1 helicopters with thin walled masts, but rejected Bell's proposal and put mast plugs on AH-1 helicopters. At the time of the accident, the Army had not installed hub springs on either the UH-1 or AH-1 helicopters. Bell did not actually propose the four bladed rotor system until 1979 and 1980, after the 1978 modification but before the accident in 1981. The record suggests various reasons why the Army did not adopt Bell's proposed modifications: the modifications were thought ineffective or too costly,

or would have interfered with the military mission of the helicopter by impairing performance because of additional weight the modifications might add.

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II

To avoid liability under the military contractor defense, Bell must demonstrate that it has met the requirements outlined in *Tozer*. A supplier of military equipment is not liable in tort for design defects when: 1) the United States is immune from liability; 2) the United States established or approved reasonably precise specifications for the equipment; 3) the equipment conformed to those specifications; and 4) the supplier warned the United States about dangers involved in the use of the equipment that were known to the supplier but not to the United States. *See Tozer,* at 408. Here, the Army was immune from liability under *Feres v. United States,* 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950), and we find that the other elements of the defense have been satisfied.

1. The elements of the defense do not vary with plaintiffs' theory of recovery. The district judge instructed the jury on the government contractor defense, but gave different instructions for strict liability and negligence. The instructions for strict liability were appropriate, but the district judge's characterization of the defense as it applies to negligence was erroneous. The judge instructed the jury to "note that the government contractor defense is different for strict liability than for negligence: the government must actually design or mandate or compel the design in question under negligence—under strict liability

the government must only establish or approve reasonably precise specifications for the allegedly defective design." As we said in *Tozer,* the elements of the goverment contractor defense remain the same whether plaintiff's theory of recovery (412) is one of negligence or strict liability. Under either theory, government approval of equipment specifications, not design or dictation of them, is all that is required.

2. Plaintiffs argue that since Bell originally designed the 540 rotor system in the early 1960's without any participation by the Army, the government neither set nor approved reasonably detailed specifications. That argument overlooks a wealth of subsequent history. The Army had been using helicopters equipped with the 540 rotor system for some twenty years before Ellis and Dowd's accident; almost 9,000 UH-1 and AH-1 helicopters flew in Vietnam. The Army had investigated and analyzed incidents of mast bumping in the early 1970's, discussed the problem at some length with Bell, and prepared two reports on inflight mast bumping. The length and breadth of the Army's experience with the 540 rotor system—and its decision to continue using it—amply establish government approval of the alleged design defects.

The district court acknowledged that in 1978 the Army required Bell to use the 540 rotor system on the AH-1S: "All of the following assertions made by Bell are correct: The Army did enter into a contract with Bell to *inter alia* install an Army requisitioned 540 Rotor System ("teeter-totter") on the AH-1S helicopter; the Army did not request or order installment of any of the available safety devices mentioned above, despite knowing something of

the existence and/or efficacy of these devices; and finally, Bell was not allowed under the contract to install such devices without the permission of the Army."

The required installation of the 540 rotor system in the AH-1S helicopter may reflect the Army's judgment that, despite the defects alleged in this tort suit, the equipment had largely accomplished its mission and proved its military worth. It may reflect the Army's view that safety problems were remediable through pilot training, or that any alteration of the rotor system entailed increased risks or costs. It may simply reflect the Army's disinclination to tinker with a system that had over time worked well enough. Whatever the reasons, it is not up to the jury to second-guess this military judgment.

Nor was it within the power of the contractor to do so. The military contractor is not in the position of the manufacturer of consumer goods. Even if it developed the original design for a piece of equipment, as Bell did in the early 1960's, it cannot modify that design without United States approval. To uphold a verdict against the contractor under these circumstances would be to impose liability without responsibility, and we decline to do so here.

Nor is the Army, as plaintiff argues, in the position of the beguiled and unsophisticated consumer. *Cf. Tozer,* at 406. The Army was familiar with the capabilities and problems of the 540 rotor system; it had completed its own technical risk assessment of the problem of mast bumping; it declined to implement three suggestions—for a hub spring, a mast plug and a four-bladed rotor system—that Bell thought might alleviate it. While plaintiff naturally disputes the efficacy of those proposals, the contractor's every suggestion is not to be judged on whether it ulti-

mately proves to be a panacea. If, as the district court intimated, design of the original equipment fixed Bell's negligence for the indefinite future, Bell's incentive to propose safety modifications for its product might well be undermined. Much machinery undergoes safety refinements during the course of its useful life, and we see every reason to encourage such an evolution in military equipment.

———o———

III.

In sum, the Army approved the 540 rotor system for the AH-1S helicopter in an atmosphere of awareness and in the light of experience. Bell Helicopter, in turn, established the elements of the military contractor defense. The district court thus erred in submitting the matter to the jury. We (413) reverse its decision and remand with directions to enter judgment for defendant.

REVERSED.

Supreme Court, U.S.
FILED
OCT 7 1986
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CLERK

No. 86-379

In the Supreme Court of the United States

OCTOBER TERM, 1986

DONNA K. DOWD, et al. and
CATHERINE ELLIS, et al.,
Petitioners,

vs.

TEXTRON, INC. and
BELL HELICOPTER TEXTRON, INC.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Of Counsel:
JAMES M. FITZSIMONS
JAMES W. HUNT
MENDES & MOUNT
725 S. Figueroa Street
Los Angeles, California 90210
R. DAVID BROILES
BROWN, HERMAN, SCOTT,
DEAN & MILES
Suite 203
Fort Worth Club Building
Fort Worth, Texas 76102

GEORGE GALERSTEIN
BELL HELICOPTER
TEXTRON, INC.
P.O. Box 482
Ft. Worth, Texas 76101

CHARLES M. SHAFFER, JR.
Counsel of Record
L. JOSEPH LOVELAND
GARY J. TOMAN
JANE E. JORDAN
KING & SPALDING
2500 Trust Company Tower
Atlanta, Georgia 30303
(404) 572-4600
Counsel for Respondents

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

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BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Textron, Inc. and its subsidiary, Bell Helicopter Textron, Inc. ("Bell") respectfully submit this Brief in Opposition to the Petition for Writ of Certiorari in this matter.

STATEMENT OF THE CASE

This case involves the crash of an AH-1S(MC) Cobra attack helicopter produced by Bell pursuant to a 1978 contract with the United States Army. The opinion of the United States Court of Appeals for the Fourth Circuit in this case is reported at 792 F.2d 409 and is included as

Appendix B to the Petition. Section I of that opinion contains a concise and accurate summary of the relevant facts. Respondents respectfully submit that the Fourth Circuit's statement of the facts is a far more accurate account than that set forth in the Petition.

In 1978 Bell and the United States Army entered into a Modification Contract for the conversion of AH-1G Cobras to AH-1S(MC) Cobras, a more powerful version of the Cobra. The helicopter involved in this action was one of those converted. Pursuant to that contract, the Army specified that Bell install the 540 rotor system on the helicopters, a two-bladed teeter rotor system with which the Army had a great deal of experience prior to 1978. Indeed, as the Fourth Circuit noted, the Army's decision in 1978 to require installation of the 540 rotor system on the AH-1S Cobra was made "in an atmosphere of awareness and in the light of experience." 792 F.2d at 412.

Bell designed the 540 rotor system in the 1960's and "[t]he Army had been using helicopters equipped with the teeter rotor system for some twenty years" before the accident that gave rise to this suit. *Id.* Almost 9000 helicopters equipped with the teeter rotor system flew in Vietnam, *id.*, and the Army had investigated and analyzed numerous incidents of mast bumping in helicopters equipped with this rotor system. As early as 1973, the Army prepared its own report on 46 accidents resulting from mast bumping and concluded that the teetering rotor system had inherently unstable characteristics. 792 F.2d at 411.[1]

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1. As the Fourth Circuit noted, mast bumping occurs when the rotor dips at an extreme angle while the mast remains stationary, resulting in the hub of the rotor striking and perhaps severing the mast. When this occurs, the rotor separates from the mast and the helicopter cannot fly. 792 F.2d at 410.

During the 1970's, Bell made various proposals to the Army for possible modifications of the 540 rotor system to reduce mast bumping. The Fourth Circuit noted that "[t]he record suggests various reasons why the Army did not adopt Bell's proposed modifications: the modifications were thought ineffective or too costly, or would have interfered with the military mission of the helicopter by impairing performance because of additional weight the modifications might add." 792 F.2d at 411. Moreover, despite the risk of mast bumping in the 540 rotor system, the statistical evidence demonstrated that such a two-bladed teeter rotor system was safer than a non-teeter rotor system. Whatever the Army's ultimate reason, it made a military judgment to continue use of the 540 system, and Bell had no choice but to abide by that judgment.

Accordingly, in 1978 the Army and Bell entered into a contract for the modification of AH-1G helicopters to AH-1S helicopters with no significant change in the 540 rotor system. 792 F.2d at 411. As the district court recognized and the Fourth Circuit noted, under this contract, "the Army did not request or order installment of any of the available safety devices mentioned above, despite knowing something of the existence and/or efficacy of these devices; and finally, Bell was not allowed under the contract to install such devices without the permission of the Army." 792 F.2d at 412.

The record clearly demonstrates that the United States Army made an informed judgment in 1978 to continue to install the 540 rotor system on attack helicopters designed to accomplish sophisticated military objectives. It is within the context of this judgment that petitioners' argument must be assessed.

REASONS FOR DENYING THE WRIT

I. THE FOURTH CIRCUIT'S DECISION IN THIS CASE IS CORRECT UNDER ANY STANDARD FOR THE MILITARY CONTRACTOR DEFENSE.

While the Petition contains a vigorous assault upon the decision of the Fourth Circuit, petitioners fail altogether to offer this Court any reasonable standard for the military contractor defense that would not compel entry of judgment for respondents. Respondents respectfully submit that, under any standard for the military contractor defense adopted by the various Circuit Courts, the conclusion that respondents were entitled to judgment is correct.

The Fourth Circuit adopted a standard for the military contractor defense substantially identical to the standard previously adopted by the Third, Fifth, Seventh, and Ninth Circuits. *See McKay v. Rockwell International Corp.*, 704 F.2d 444, 449-50 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984); *Koutsoubos v. Boeing Vertol*, 755 F.2d 352, 354-55 (3d Cir.), *cert. denied*, 106 S. Ct. 72 (1985); *Tillett v. J.I. Case*, 756 F.2d 591, 597 (7th Cir. 1985); *In Re Air Crash Disaster at Mannheim, Germany*, 769 F.2d 115, 121 (3d Cir. 1985), *cert. denied*, 106 S. Ct. 851 (1986); *Bynum v. FMC Corp.*, 770 F.2d 556, 565 (5th Cir. 1985); *Tozer v. LTV Corp.*, 792 F.2d 403, 408 (4th Cir. 1986). As originally set forth in *McKay*, a military contractor is insulated from liability for injuries to servicemen arising from alleged design defects in military equipment if:

> (1) The United States is immune from liability under *Feres* and *Stencel*, (2) the supplier proves that the

> United States established, or approved, reasonably precise specifications for the allegedly defective military equipment, (3) the equipment conformed to those specifications, and (4) the supplier warned the United States about patent errors in the government's specifications or about dangers involved in the use of the equipment that were known to the supplier but not to the United States.

704 F.2d at 451. The Fourth Circuit, like the Third, Fifth, and Seventh Circuits before it, adopted the *McKay* standard virtually unchanged in a decision announced the same day as the decision in this action, *Tozer v. LTV Corp.*, 792 F.2d 403 (4th Cir. 1986), and applied that standard in this case.

It is difficult to determine from the Petition whether petitioners are challenging the legal standard adopted by the Fourth Circuit for the military contractor defense or, instead, are simply arguing that the standard was misapplied by the Court in this case. In either event, however, petitioners would be incorrect.

Focusing upon the legal standard adopted by the Fourth Circuit, petitioners actually appear to embrace the standard for the military contractor defense set forth in *McKay*. *See* Petition, at 14. Petitioners apparently believe that the *McKay* standard is correct, but that the Fourth Circuit altered it by removing the burden of proof from the defendant. This is patently incorrect. The Fourth Circuit expressly held that "[t]o avoid liability under the military contractor defense, *Bell must demonstrate* that it has met the requirements outlined in *Tozer*." 792 F.2d at 411. (Emphasis added). Based on a careful review of the record, the court concluded that Bell had

met its burden of proving each of the elements of the defense.[2]

To the extent that petitioners are challenging the application of the military contractor defense to the facts of this case, their argument is also incorrect. Petitioners focus upon the original design of the 540 rotor system in the 1960's, rather than upon the 1978 contract that led to the production of the AH-1S(MC). The Fourth Circuit correctly rejected petitioners' arguments in this regard. There is no question but that Bell originally designed the 540 rotor system. By the time the 1978 contract was executed, however, the United States Army was intimately familiar with the 540 rotor system based on twenty years of service in thousands of helicopters. The Fourth Circuit correctly determined that the informed decision by the Army in 1978 to install the 540 rotor system on the AH-1S(MC) was the proper point for evaluating the application of the military contractor defense, and petitioners offer no reason why this determination should be reversed by this Court.[3]

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2. At another point, petitioners appear to assert that a military contractor should only be insulated from liability when it can establish that it was *compelled* by the government to design and manufacture a product in a particular manner. *See* Petition, at 12-13. Not only does this argument rely on outdated legal authorities, but, more importantly, it does nothing to aid petitioners. Under the 1978 contract at issue in this case, it is clear that Bell was in fact compelled to install the 540 rotor system, without modification, to the helicopter involved in this case.

3. Petitioners also devote a great deal of attention to the fact that the 540 rotor system was patented by Bell when it was originally developed, although the purported legal significance of this fact is unexplained. Given the Fourth Circuit's correct determination that the 1978 contract was the proper point for evaluating the military contractor defense, the fact that the design was patented by Bell is irrelevant to determining whether Bell established the elements of the defense.

Significantly, even the district court agreed that, if the 1978 decision of the Army controlled, the military contractor defense would insulate Bell from liability in this action. Indeed, the district court explained that, if the case were viewed by reference to the 1978 contract, "this case would never have gone to trial. There was never any contention that Bell was negligent in the mere act of installing this particular rotor system pursuant to the modification contract." (Memorandum opinion, Appendix A to Petition, p. 8). Like petitioners, however, the district court erroneously focused on the original design of the 540 rotor system. The Fourth Circuit rejected this approach, reasoning that "[i]f, as the district court intimated, design of the original equipment fixed Bell's negligence for the indefinite future, Bell's incentive to propose safety modifications for its product might will be undermined. Much machinery undergoes safety refinements during the course of its useful life, and we see every reason to encourage such an evolution in military equipment." 792 F.2d at 412. Thus, the Fourth Circuit concluded that the proper focus was upon the 1978 contract.

Finally, respondents are aware that the Eleventh Circuit Court of Appeals has established a standard for the military contractor defense that is markedly different from that set forth in *McKay* and adopted by the Fourth Circuit in *Tozer* and this case. *See Shaw v. Grumman Aerospace Corp.*, 778 F.2d 736 (11th Cir.), *petition for cert. filed*, 54 U.S.L.W. 3632 (U.S. Mar. 17, 1986) (No. 85-1529).[4] Even

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4. Respondent Bell Helicopter Textron, Inc. is one of the amici curiae who have submitted a brief in support of Grumman Aerospace Corporation's pending petition for certiorari in *Shaw*. As explained in that brief, the *Shaw* standard for the military contractor defense is completely unworkable when applied to a

(Continued on following page)

under the standard set forth in *Shaw*, however, the military contractor is insulated from liability if it proves "that it timely warned the military of the risks of the design and notified it of alternative designs reasonably known by the contractor, *and* that the military, although forewarned, clearly authorized the contractor to proceed with the dangerous design." 778 F.2d at 746 (emphasis in original). When applied to the 1978 contract at issue in this case, the *Shaw* standard is met. This case does not involve a design contract for a new product, but instead involves a decision by the military to order installation of a component part with which it had substantial experience. As the Fourth Circuit explained, the United States Army was fully aware of the possible dangers of the 540 rotor system in 1978, having conducted its own detailed investigation into the causes of mast bumping, and Bell clearly notified the Army of modifications that could be made to the 540 rotor system. Nonetheless, the Army chose to require the installation of the unmodified 540 rotor system in the AH-1S(MC). Thus, even under the standard of *Shaw*, the Fourth Circuit's judgment in this case was unquestionably correct.

In summary, the Fourth Circuit decided, based on the uncontroverted facts in the record, that the decision of the United States Army in 1978 to require installation of the 540 rotor system in the AH-1S(MC) Cobra was the critical event for determining application of the mil-

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Footnote continued—

contract for the design of a weapons system, because it mandates judicial second-guessing of the military's knowledge and expertise in deciding whether to accept a design. The present case is substantially different, however, based on the Army's extensive experience with the 540 rotor system, and the Army's undisputed knowledge of the problem of mast bumping, before entering into the contract at issue.

itary contractor defense. Petitioners offer this Court no reason to reject this legal conclusion. Respondents submit that they established the elements of the military contractor defense as a matter of law with regard to the 1978 contract, and the Fourth Circuit's determination that judgment should be entered in respondents' favor should not be disturbed.

II. THERE WAS NO DEPRIVATION OF THE RIGHT TO TRIAL BY JURY.

Petitioners' suggestion that the Fourth Circuit's decision deprived them of the right to trial by jury is not only unsupported in petitioners' argument, but is absurd on its face. As noted above, even the district court recognized that, if the proper focus were the 1978 contract, "this case never would have gone to trial." There simply was no issue to be tried when the elements of the military contractor defense were evaluated by reference to the Army's 1978 decision. Accordingly, once the Fourth Circuit determined that the Army's 1978 decision was the controlling event, the entry of judgment in favor of respondents was clearly correct.

CONCLUSION

For the reasons set forth above, respondents respectfully submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

Of Counsel:
JAMES M. FITZSIMONS
JAMES W. HUNT
MENDES & MOUNT
725 S. Figueroa Street
Los Angeles, California 90210
R. DAVID BROILES
BROWN, HERMAN, SCOTT,
DEAN & MILES
Suite 203
Fort Worth Club Building
Fort Worth, Texas 76102

GEORGE GALERSTEIN
BELL HELICOPTER
TEXTRON, INC.
P.O. Box 482
Ft. Worth, Texas 76101

CHARLES M. SHAFFER, JR.
Counsel of Record
L. JOSEPH LOVELAND
GARY J. TOMAN
JANE E. JORDAN
KING & SPALDING
2500 Trust Company Tower
Atlanta, Georgia 30303
(404) 572-4600
Counsel for Respondents